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In The

Supreme Court of the United States

October Term, 1994

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,

Petitioners,

v.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. Petitioners' Reply To Respondent's Statement Of The Case

In its statement of the case, the respondent contends that the petitioners have mischaracterized the challenged ordinance as being enacted in the name of aesthetics, contending that such a characterization is not supported in the record. To the contrary, the ordinance itself states that its purpose is to "minimize adverse public safety, visual, aesthetic affects and environmental problems in affected districts through implementation of security

measures, and aesthetic pleasing and environmentally enhancing landscaping." Appendix, p. 35a. The security measures contained in the ordinance regulating parking attendants and lighting standards are not in issue in this case. The landscaping requirements which were enacted in direct response to the city's concern for "aesthetic pleasing and environmentally enhancing landscaping" are in issue. Thus, contrary to the respondent's contention, the ordinance was indeed enacted in the name of aesthetics.

The respondent next contends that its studies have shown that any adverse financial impact of the ordinance "would be recovered within three years" by a parking rate increase. The record does not support this statement. The statement in the record with respect to this issue is that "the financial impact *could* be recovered through a rate increase of between $.10 and $.32 per space per day", but the statement is not supported by any evidence and is merely the opinion of the respondent's own employee. The respondent's belief that the costs of compliance with the new ordinance may be passed on to customers is mere speculation. The Court should not assume, therefore, that the petitioners' loss of parking spaces will not have a severe adverse financial impact on them.

Finally, in its statement of the case the respondent has overstated its reliance upon a concentration of parking lots for choosing the zoning districts made subject to the ordinance. The record is clear that the respondent's concerns about aesthetics in the downtown and midtown areas of Atlanta were central in its determination of which zoning districts to include. As the respondent itself has admitted in its brief, the landscaping requirements

imposed by the ordinance are near rapid transit stations. These stations will carry the bulk of visitors in the City of Atlanta during the 1996 Summer Olympics. Moreover, the director of the city's bureau of planning stated in his affidavit that the districts were chosen not only because of their concentration of parking lots but also because of the large amount of pedestrian traffic in these districts. He concluded that parking lots without landscaping can adversely affect the aesthetic quality of the downtown area. The reality is that the districts included were chosen in an effort to beautify an area of the city at the petitioners' expense in advance of the 1996 Olympics.

II. Petitioners' Reply To Respondent's Reasons For Denying The Writ

A. The Decision Of The Supreme Court Of Georgia Upholding The Parking Lot Ordinance Is In Conflict With *Dolan v. City of Tigard*.

The respondent contends that *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), is inapplicable because the challenged ordinance classifies entire areas of the city and contains no requirement that a portion of the petitioners' property be deeded to the city. In view of the facts of this case, respondent's argument is shortsighted.

The legislative determinations in question here are applicable to a small portion of only seven of the city's 38 zoning districts and, accordingly, are far from determinations "classifying entire areas of the city." Moreover, in the zoning districts in which these regulations are applicable, they are applicable only to those operating surface

parking lots having thirty or more spaces. Thus, while the ordinance may appear to be generic on its face, it is specific as applied.

Second, with respect to the requirement of the ordinance under review in *Dolan* that the landowner deed portions of her property to the city, it takes little imagination to compare the petitioners' landscaping burdens in this case – at their own expense on their own property – to the petitioner's greenway deed requirements in *Dolan*. The result is that the analysis utilized in *Dolan* is applicable to these facts and demands reversal of the Georgia Supreme Court's decision.

The respondent also contends that the regulations in issue are constitutionally indistinguishable from landscaped buffer requirements and zoning setbacks routinely utilized throughout the country, relying on *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927). The respondent's reliance upon this case is misplaced. In *Gorieb*, the Court considered a zoning setback requirement "to which all buildings subsequently erected must conform," not a remedial zoning ordinance retroactively applied to existing legally permitted businesses. 274 U.S. at 604, 47 S.Ct. at 676.

Finally, the respondent argues that the petitioners' application of the *Dolan* rough proportionality test to this case is inappropriate. In *Dolan*, the Court considered "whether the degree of exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development." ___ U.S. at ___, 114 S.Ct. at 2318. The test the Court settled upon placed the burden on the city to "make some sort of

individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at ___, 114 S.Ct. at 2319-20.

The *Dolan* rough proportionality test is applicable to this case because the respondent has added conditions in the form of expensive landscaping requirements to petitioners' continued operation of their parking lots, not unlike the greenway dedication requirements the city imposed on the petitioner's continued operation of her supply store in *Dolan*. The question presented is whether the respondent has met its burden of proving that its landscaping conditions are "related both in nature and extent" to the petitioners' lawful use of their parking lots. The reason the respondent wants the Court to believe the *Dolan* test is inapplicable here is obvious – the respondent cannot meet the burden placed on it under the test.

In order to correct the Supreme Court of Georgia's erroneous reading of *Dolan*, petitioners' application for writ of certiorari should be granted.

B. The Decision Of The Supreme Court Of Georgia Is In Conflict With Controlling Precedent Of This Court Because The Parking Lot Ordinance Requires The Owners And Operators Of Surface Parking Lots Within The Affected Zoning Districts To Make Improvements That, While Perhaps Valuable To Others, Are Useless To Them.

In response to petitioners' reliance on *Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), and *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 36

S.Ct. 204, 60 L.Ed. 392 (1916), the respondent contends that the holdings of these cases are no longer applicable due to intervening regulatory takings cases. The respondent has not attempted to distinguish *Norwood* or *Myles Salt Co.* from the facts of this case, nor does the respondent argue that these cases have been overruled. Instead, without any references or citations to the record, respondent contends that the special assessment analysis contained in *Norwood* and *Myles Salt Co.* is inapplicable here because the petitioners themselves allegedly created the need for the challenged regulations. This allegation is made even though the petitioners' parking lots were built before the challenged ordinance was enacted in strict conformity with building permits issued by the city and pursuant to building codes adopted by the city. The respondent's allegation that the challenged regulations were enacted due to the petitioners' own actions is unsupported by the record. Instead, the record supports petitioners' claim that the ordinance was enacted to enhance the aesthetic beauty of downtown Atlanta.

Finally, the respondent relies upon *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), for its argument that the petitioners must bear the burden of retroactive landscaping regulations if they desire to continue to use their property for parking purposes. The respondent's reliance on *Yee* for this proposition is misplaced. The only question decided in *Yee* was whether a rent control ordinance affecting mobile home parks constituted a physical taking of the owner's property. *Id.* at ___, 112 S.Ct. at 1530-31. The Court expressly refused to consider whether the ordinance violated the park owners' substantive due process rights and whether

the ordinance constituted a regulatory taking. *Id.* at ___, 112 S.Ct. at 1531-34. Accordingly, *Yee* fails to support the respondent's contention.

C. The Decision Of The Supreme Court Of Georgia Is In Conflict With Controlling Precedent Of This Court Because The Parking Lot Ordinance Violates The Equal Protection Clause Of The Fourteenth Amendment.

In response to the petitioners' equal protection claim premised upon the Parking Lot Ordinance's application to only seven of the respondent's 38 zoning districts and the omission of unpaved vacant lots and lots having less than thirty spaces, the respondent states that the chosen lots "create a greater negative impact." In other words, the respondent contends that it may legislatively determine that certain areas of the city are more important than others for aesthetic improvement purposes and that any such determination is *per se* rationally related to a legitimate governmental interest.

Contrary to respondent's belief, there is no rational basis for requiring some to improve themselves aesthetically at the owner's expense, while similarly situated others are allowed to remain in their present unkempt condition. The ordinance violates the petitioners' rights under the Equal Protection Clause.

This the 25th day of April, 1995.

Respectfully submitted,

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